BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD L. KEATHLEY Claimant	)	
VS.	)	
BROWN & BROWN, INC. Respondent	)	Docket No. 1,030,660
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requests review of the January 25, 2007 Supplemental Preliminary Hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The claimant alleged he suffered a series of injuries to his back through August 8, 2006. After a preliminary hearing on October 25, 2006, the Administrative Law Judge (ALJ) entered an Order denying claimant benefits because he failed to provide timely notice of his accident nor establish just cause to extend the notice period to 75 days.

The preliminary Order was appealed to the Board. The Board Member assigned the case on appeal noted that the first step in the determination of whether timely notice was provided is to determine the date of accident. And K.S.A. 2006 Supp. 44-508(d) establishes the criteria necessary to determine the date of accident for a series of events, repetitive use, cumulative traumas or microtraumas. The statute offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which alternative factual situation established by statute has occurred. The Board Member determined the facts of this case established an August 29, 2006 accident date (the date claimant gave respondent written notice of the injury) which resulted in timely notice. Consequently, the matter was remanded to the ALJ to address the remaining jurisdictional issue whether claimant suffered accidental injury arising out of and in the course of his employment.

Upon remand, the ALJ noted that the date of accident determined by the Board Member was more than three weeks after claimant last performed work for respondent. Consequently, the ALJ found the "claimant was unable to establish that his injury arose in the course of his employment. An injury occurring three weeks after he last performed work for Respondent did not occur 'while the workman was at work and in his employer's service.'"

The claimant requests review of whether the ALJ erred in finding that the claimant was unable to establish that his injury arose in the course of employment.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

When dealing with injuries that are caused over a period of time by overuse or repetitive microtrauma, it can be difficult to determine the injury's date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law and the recent statutory change in K.S.A. 2006 Supp. 44-508(d), both recognize the necessity of a single accident date in repetitive trauma cases in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. A single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the last day worked or the employment relationship terminated is not prohibited by the statute. To the contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

Claimant still has the burden to prove that the repetitive series of traumas arose out of and in the course of his employment. But whether claimant has met that burden is neither controlled by nor dependent upon the separate factual determination, as required by statute, of the single date of accident. Under the statute, when the injuries occurred and the fictional single date of accident need not necessarily be the same date in a repetitive trauma case.

Claimant first began working for the respondent in August or September 2005. He was hired to work as a skreed operator. The respondent's business is road construction, i.e., milling and re-mixing asphalt. Claimant testified he was a heavy equipment operator for the respondent which included building or repairing roads. Claimant stated his job in

Clovis, New Mexico was mostly spent on a rubber tire loader and doing oil changes. He also stated that the Scott City job was working on a steel wheel roller which was not as forgiving as the rubber tire loader and claimant also ran a loader. But at the Johnson City job claimant was strictly running a loader due to the road being milled up. He had to run the loader constantly up and down out of a ditch.

The claimant alleges his accident occurred not in a single, acute event but over a period of a few days while running the loader up and down out of a ditch. He would notice the pain as he got out of his seat at the end of the day. Claimant did not work after August 8, 2006.

Claimant testified he had pain medication left over from a December 13, 2005 neck surgery and when he began to have the discomfort in his back he just started taking Flexeril and Oxycodone.[1] He further testified that the medication helped for a while and then his pain worsened so he sought medical treatment. When claimant later went to the emergency room at a Salina hospital on August 21, 2006, the record of that visit noted that his low back complaints are "possibly" due to work, "jouncing around."[2]

At the preliminary hearing on October 25, 2006, the ALJ stated in pertinent part:

> So I'm presuming for the sake of argument that we have an injury from operating the loader, particular[ly] as claimant described it, going up and down the ditches, and the jolting that he received, and we keep coming back to the just cause issue, because if we don't get to just cause, then I don't get to the issue of the injury.
>
> I would likely find that we have a compensable injury if we get past this just cause bump, so what we're going to do is take this under advisement and I'm going to give counsel seven or ten days, whatever counsel feel they need to brief the issue of what is just cause.[3]

This Board Member finds claimant has met his burden of proof to establish that as he operated the loader working for respondent through August 8, 2006, he suffered repetitive trauma injuries to his back. Such injuries occurred while claimant was at work and in his employer's service, i.e., in the course of claimant's employment for respondent during that time period.

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[1] P.H. Trans. at 15.

[2] *Id.*, Resp. Ex. A.

[3] *Id.* at 24.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 25, 2007, is reversed and remanded to the Administrative Law Judge for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of April 2007.

_____
BOARD MEMBER

c: Scott M. Price, Attorney for Claimant
Douglas A. Dorothy, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[4] K.S.A. 44-534a.

[5] K.S.A. 2006 Supp. 44-555c(k).